FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

REPLY COMMENTS OF THE CITY OF NEW YORK

I. INTRODUCTION

The City of New York ("the City") submits these reply comments in response to comments submitted regarding the Second Further Notice of Proposed Rulemaking ("FNPRM") issued by the Federal Communications Commission ("the Commission" or "the FCC") in the above-listed proceeding. As described below, the comments by cable industry representatives are incorrect in many respects, including but not limited to those described below, and thus fail to support the decisions they recommend that the Commission take.

II. REPLYING TO THE COMMENTS OF VERIZON

Many of the arguments and claims made in Verizon's comments regarding the FNPRM[1] are incorrect, beginning with the introductory material in such comments. The Verizon Comments

[1] Comments submitted by Verizon (the "Verizon Comments") in response to *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Second Further Notice of Proposed Rulemaking, FCC 18-131 (rel. Sept. 25, 2018).

represent that including costs of cable-related franchise requirements will result in savings passed on to consumers. Such a representation contradicts economic logic. Basic economic principles recognize that consumer prices are set by supply and demand, not the cost of providing the product or service sold. The cost of providing service plays a role only through its potential effect on the supply side of that formula. As costs of producing a product or service go down, in theory new entrants are enabled to enter the market, or existing entrants to increase production, eventually increasing supply and pushing prices downward. But communications networks, especially the last mile element in which cable operators participate, are inherently subject to high barriers to supply increases. Large initial capital investment (with low salvage value), network efficiencies and the low marginal cost to incumbents of adding each additional subscriber all discourage new market entry and thus supply increases.

As a result, reduced external costs are unlikely to lead to reduced prices but rather to increased profits for incumbents. In short, treating non-monetary franchise requirements as "franchise fees" will likely transfer benefits from the public to the management and ownership of incumbent cable operators. If the Commission in a final decision were to rely to any degree on the type of assumption about the effect on subscriber rates that the Verizon Comments claim, the Commission would need to explain why the above critique of those claims is incorrect.

Also, the Verizon Comments claim that limiting LFA authority over incumbent cable operator provision of services other than cable service will "facilitate deployment of broadband service". This claim defies logic. Such limits would merely constrain LFA authority to protect consumers of services provided by incumbent cable operators who have already have made large investments

in broadband-capable infrastructure and are planning to continue to pursue such investment[2]. Interpreting the Cable Act as providing protection to incumbent cable operators that is unavailable to those not covered by the Cable Act would, if anything do nothing more than negatively affect efforts by state and local governments to increase entry in the broadband infrastructure market by those not covered by the Cable Act.

The City has previously explained[3] why it is incorrect to claim, as the Verizon Comments do[4], that an LFA can simply convert monetary requirements into cable-related non-monetary requirements and escape Cable Act restriction. Incumbent cable operators are already protected from an LFA's abuse of its authority with respect to cable-related requirements by the renewal provisions of the Cable Act. Treating such requirements as "franchise fees", in addition to their being subject to the "reasonable cable-related community needs and interests" test, would be redundant as well contrary to the language and intent of the Cable Act.

[2] According to the cable operators' trade organization NCTA, "As of June 2018, cable operators offered gigabit service or better to 74 percent of cable's broadband footprint (63 percent of U.S. housing units)…." See page 2 of Comments submitted November 14, 2018 by NCTA (hereinafter, the "NCTA Comments") in response to *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, FCC 18-131 (rel. Sept. 25, 2018).

[3] See pages 5-6 of Comments submitted by the City of New York, November 14, 2018 (the "City Comments") in response to *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, FCC 18-131 (rel. Sept. 25, 2018).

[4] Verizon Comments, page 4 ("…unless all in-kind assessments are included within the franchise fee cap, the cap itself would be meaningless.").

Verizon also misapplies[5] the Sixth Circuit's opinion language in the *Montgomery County*[6] decision. As explained in the City's previous comments, the *Montgomery County* opinion's finding that certain limited types of non-monetary requirement can be treated as the equivalent of a monetary fee does not mean that all types of such requirements are thus treatable. The Commission itself has acknowledged this fact in the FNPRM by proposing to recognize buildout requirements as not treatable as the equivalent of a monetary fee. Verizon thus fails in its attempt to claim that because the Sixth Circuit approved some such treatment, therefore it all such treatment is legal or appropriate.

III. REPLYING TO THE COMMENTS OF NCTA

Many issues could be raised with the lengthy NCTA Comments submitted in response to the FNPRM, but one in particular epitomizes a central problem with the assumptions that underlie much of the NCTA Comments. On page 3 of its comments, NCTA claims "Once cable systems are deployed, cable operators lack bargaining power to refuse these demands due to the stranded investment that cannot be recovered in the event of a franchise denial." But as its support for this claim, NCTA cites the House committee report from the 1984 Cable Act, which was explaining the *pre-Cable Act* environment, and presenting what are now the Cable Act's renewal provisions as the *statutory solution* to that problem. NCTA's argument here is akin to a doctor calling a patient in for appendix removal surgery based on a years-old report of appendicitis and *after* the patient has already had her appendix removed.

[5] Verizon Comments, page 5.
[6] *Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2017).

It is in this same vein that NCTA cites some aspects of a cable operator's relationship with the not-for-profit corporations that provide the programming on cable public access channels in the City. The existing cable operators operating in the City have been enjoying the benefits of their franchise contracts for the past seven to ten years, based on carefully negotiated agreements involving sophisticated and aggressive negotiators representing the operators fully familiar with their renewal rights under the Cable Act. The City during those negotiations, pursuant to the informal renewal process expressly permitted by Congress, agreed *not* to include in the executed franchise agreements a variety of requirements that would have been permissible for it to require under the Cable Act. *In return*, the franchisees agreed to certain obligations on their part. To have NCTA now cherry-pick selected provisions of a franchise agreement, and of contracts between cable operators and independent public access corporations that include their own contractual consideration on both sides, as if such provisions are somehow nefarious impositions on helpless cable companies, is unpersuasive and inappropriate. NCTA, contrary to Congressional mandate, is seeking "solutions" for non-existent problems by eliminating public benefits for the sole purpose of enhancing cable company profits. The FCC should not, and indeed cannot lawfully, pursue such an approach.

The NCTA Comments also challenge the conclusions of the Oregon Supreme Court in the *City of Eugene* case.[7] The Oregon Supreme Court's opinion properly describes the applicable statutory language and NCTA's comments fail to adequately rebut the points made in that opinion. Indeed, by reclassifying broadband internet access service as an information service rather than a telecommunications service, the Commission has made the Oregon Supreme Court's conclusions

[7] *City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (Or. 2016)

even more plainly obvious than when they were originally issued. NCTA's critique of the *City of Eugene* decision can be described in a nutshell as criticizing the Court for having found that the word "construction" in 47 USC Section 541 actually means "construction" and that the phrase "this subchapter" in the same section actually means "this subchapter". Fundamentally, NCTA arguments rely on the false assumption that state and local control of what is installed in local streets and roads arises only to the extent it is expressly granted in federal statute. But installations in local streets and roads are entirely within the control of state and local government to begin with, and such control is limited if and to the extent it is clearly and expressly limited by federal statute (and such limits are within the federal government's authority under the Constitution).[8]

IV. CONCLUSION

The City's description above of the flaws in the Verizon Comments and the NCTA Comments further support the views previously expressed in the City Comments and in other comments

[8] As an example of NCTA's misleading arguments in this respect, see footnote 28, and the associated text, of the NCTA Comments. NCTA cites L*iberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 219 (1st Cir. 2005) as its support for an argument that 47 USC Section 621 authorizes not merely *construction* of a cable system but use of such a system for any and all services of which such a system might be capable . But neither Section 621 nor the *Liberty Cablevision* opinion say such a thing. *Liberty Cablevision* was a case involving two separate requirements for the *same* uses, not two separate charges for *different* uses. The citation of such an inapplicable decision suggests only the weakness and unsupported nature of NCTA's argument.

submitted by and on behalf of municipal governments.

Respectfully submitted,

The City of New York

s/_____

Bruce Regal
Senior Corporation Counsel
New York City Law Department
100 Church Street
New York, New York 10007